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No. 90-96

In The

Supreme Court of the United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Plaintiff and defendant agree on several of the important factors which are material to the first question raised in this case:

a. If there is a failure to objectively allege in a *Bivens* complaint assertions sufficient under Rule 8(a)(2) standards to state a claim of a violation of a clearly established right, the complaint must be dismissed. Resp. Br. at 16-19, 22. Thus, qualified immunity provides an official with immediate protection from suit even where a

constitutional right has been violated but where that right was not clearly established at the time of the incident.

b. Where malice is an element of the clearly established right which has been claimed to have been violated, "*this* threshold immunity question," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added), whether a clearly established right has been alleged, should be deemed to have been satisfied.[1] That is, while bare allegations of malice cannot be used to undermine a claim of qualified immunity, when malice is alleged as an element of a constitutional tort, that state of mind should be treated as any other element in the case. Resp. Br. at 18-20.

c. When malice has been alleged as an element of the constitutional claim, a plaintiff may plead that element generally in his complaint in conformity with the provisions of Rule 9(b). Resp. Br. at 23.[2] That is, it is

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[1] Throughout his brief, defendant changed "this" to "the" when he cited or referred to the *Harlow* quote, above. See, e.g., Resp. Br. at 17, 18, 20, 24. This seemingly inconsequential but serious alteration explains why defendant believes, see *infra*, and why some lower courts have held, that *Harlow* stands for the rule that no discovery at all is permitted before the entire issue of qualified immunity has been determined. A proper reading of *Harlow*, however, underscored, for example, in *Anderson v. Creighton*, 483 U.S. 635, 646-47 n.6 (1985), shows that discovery may not be conducted only prior to a determination of "this threshold question of immunity," that is, only not prior to the determination of whether a violation of a *Harlow-Anderson* clearly established right has been alleged. See also, App. 23a.

[2] In addition to those cases which demonstrate that malice may be an element of the right which plaintiff alleged was violated, cited in plaintiff's brief, at 19, see *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591 (1845).

inappropriate to apply a "heightened pleading standard" to a *Bivens* complaint.

d. The court below erred in its insistence that "direct" as opposed to circumstantial evidence of unconstitutional motive must be pleaded in order to defeat a qualified immunity defense. Resp. Br. at 20-21 n. 13. This bears particular emphasis since one of the two key rationales used by the court below in denying plaintiff's claim was that he failed to allege "direct evidence" of an unconstitutional motive. App. 13a-14a. The government does not defend that aspect of that court's decision here.[3]

e. Once discovery has taken place, the appropriate standard under Rule 56 is not simply whether a clearly established right has been stated but rather whether there are specific facts of record, in accordance with this Court's decisions in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), to allow the case to proceed beyond summary judgment. Pet. Br. at 22-23.

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[3] Thus, at the pre-discovery summary judgment stage, if it is determined that where malice is alleged a standard of pleading greater than that required under Rules 8(a)(2) and 9(b) must be met, see, *infra*, the question then becomes whether plaintiff's circumstantial evidence was sufficient to meet that standard and whether he is therefore entitled to discovery on the limited issue of qualified immunity. *Anderson v. Creighton*, 483 U.S. at 646-47 n. 6. Applying a heightened pleading standard, the trial court ruled that it was. Given the district court's conscientious review of, and its application of the law to, the record, unless this Court determines that in making that finding the trial court abused its discretion, or was clearly erroneous, its decision should not now be disturbed.

2. The issues which divide the parties are two. First, where a motion for summary judgment is based upon qualified immunity, whether *prior to discovery* a plaintiff must provide facts with respect to any element of the constitutional claim, including the element of unconstitutional motive, sufficient to satisfy the Rule 56(e) standard. In other words, should the Rule 56(e) "specific facts" pleading requirement be applied to the issue of malice, or to any other element of the clearly established right alleged in the complaint, *before* plaintiff has had the opportunity to secure additional relevant facts. Second, and specifically with respect to this case, whether the evidence alleged as a whole, including circumstantial evidence of malice and the reasonable inferences which may be drawn from that evidence, was a sufficient basis for the trial court to order limited discovery, on the material elements of malice and the falseness of the statements made in defendant's letter, in order to determine whether these issues were genuinely in dispute.[4]

a. Under settled law of Rule 56 doctrine, discovery should be permitted on any issue fairly raised by the pleadings, including unconstitutional motive, so that the purpose of summary judgment, to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial," can be realized. Comments to 1963 Amendments, Rule 56. See also, *Celotex Corp. v.*

[4] In ordering limited discovery the trial court stated: "If the information supplied by defendant is true, and the plaintiff is plainly incompetent and derelict, the plaintiff must bear the cross. Furthermore, the defendant must be protected in providing such information if he acted in good faith." App. 52a.

Catrett, 477 U.S. 317, 322 (1986) (" . . . Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery. . . . "). The doctrine of qualified immunity as construed by this Court provides a significant defense to governmental officials who have in fact violated constitutional rights but who are protected from liability if the rights were not clearly established at the time of the incident. That defense, however, does not purport to change the rules which govern summary judgment procedure. Where the right alleged is clearly established in a specific and narrow sense, *Anderson v. Creighton*, 483 U.S. 635 (1987), and malice or some other state of mind is an element of the claim, the general discovery tools listed in Rule 56(c) should be utilized, and the post-discovery "specific facts" standard, Rule 56(e), should only then be applied. Before discovery has taken place, however, if a plaintiff does not file a Rule 56(f) statement and instead relies on affidavits in opposing a summary judgment motion, there should be "some evidentiary basis . . . [which would] demonstrate . . . with some plausibility," App. 24a, that a party's opposition is "justif[ied]," Rule 56(f), and that he "might defeat" a qualified immunity claim. App. 24a.[5]

Together with the formidable hurdle of demonstrating prior to discovery that a clearly established right

[5] This standard provides a workable accommodation between the policies reflected in the federal rules, a plaintiff's right to prove his case and qualified immunity concerns.

has been violated, this standard does not "end run" the policy considerations at stake when a federal official faces personal liability for his unconstitutional acts. Rather, as the government itself recognizes, the impermissible motive allegations have been made to prove a specific element of a constitutional claim. Accordingly, a plaintiff who has met this standard ought to be able to proceed to the next stage of litigation, that is, to narrowly tailored discovery such as that ordered by the trial court, App. 52a, in order to determine whether there are genuine issues for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

b. As to the second question, defendant characterizes as "conclusory," Resp. Br. at 20, 25, plaintiff's circumstantial evidence of malice and argues that it was therefore insufficient to meet the "specific facts" standard considered by defendant to be proper for pre-discovery determinations of qualified immunity claims. Even if defendant is correct in his assessment that the Rule 56(e) standard should apply pre-discovery, ample facts were alleged to warrant the straightforward application of the procedure announced in *Anderson v. Creighton*, 483 U.S. at 646-47 n.6. In other words, and tracking the steps set forth in that case, the trial court determined that a clearly established right sufficiently had been asserted. The court therefore ordered discovery on the discrete question as to whether "the actions . . . [Gilley] took were different from those . . . [Siegert] allege[d]. . . . " *Id.* See *supra*, n. 4.

Plaintiff alleged in his complaint that defendant had acted maliciously in writing false information about him which resulted in a "stigma-plus" injury. Plaintiff's allegations as a whole, however, contained much more than

mere conclusions. He explicitly alleged in his complaint and in opposition to summary judgment 1) that he had always had exemplary job performance ratings prior to defendant's evaluation, J.A. 20, 2) that plaintiff's proposed removal from Saint Elizabeths was due to his conflicts with defendant, J.A. 21, 3) that there had been long-standing professional and personal conflicts between the two psychologists, J.A. 5-6, and 4) that defendant resented plaintiff's being away from work as a result of plaintiff's head injury. J.A. 20. Malice was also evidenced by reasonable inference: 1) defendant had failed to respond to what the Credential Information Request Form actually sought, and 2) the language defendant used was "extreme" which therefore "inherently cast . . . doubt on defendant's neutrality." App. 24a-25a.

Plaintiff's assertions as a whole, and the reasonable inferences that may be drawn from them, significantly exceeded a "complete failure of proof," *Celotex Corp. v. Catrett*, 477 U.S. 242, 255 (1986), and more than showed that there were genuine issues for trial and that a reasonable jury could justifiably infer and reasonably conclude that defendant had acted with malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Therefore, discovery as ordered by the trial court should have been allowed to proceed.

3. Defendant contends that the issue as to whether the court of appeals erred in dismissing plaintiff's case, because a clearly established right independent of malice had not been alleged, was not presented as a question for review, was mentioned "only in passing" in plaintiff's petition for certiorari and is "scarcely related" to the questions on which certiorari was granted. Therefore,

defendant argues, this issue is not properly before this Court. Resp. Br. at 26 n. 16.

That the court below erred on this point was squarely raised and "pressed," *Illinois v. Gates*, 462 U.S. 213, 219 (1983), in plaintiff's petition for certiorari. Pet., at 19-20 n. 27. As importantly, the issue of whether plaintiff had alleged a clearly established right was "pressed" by the government and was "passed upon," *Illinois v. Gates*, 462 U.S. at 219, by the court below as a result of the government's urging. App. 14a-16a. Moreover, that question is fairly included within the first question explicitly presented for review. Indeed, that inquiry is the very "threshold" to the entire immunity question, *Harlow v. Fitzgerald*, 457 U.S. at 818, and is therefore "necessarily connected," *Dewey v. Des Moines*, 173 U.S. 193 (1899), to the first question presented for review. See also defendant's brief in opposition to plaintiff's petition for certiorari, at 8. Accordingly, "since the inquiry does not change the substance of the questions already presented . . . " Sup. Ct. Rule 24.1(a), this question should be decided on review. See *Illinois v. Gates*, 462 U.S. 213 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 114 n. 9 (1982) (the argument that the death penalty was excessive comprises the argument that the sentencer erred in refusing to consider relevant mitigating circumstances); *Pullian v. Allen*, 466 U.S. 522, 528 n. 5 (1984) (the question whether immunity bars an award of attorneys' fees against a judge was held to include the question of whether judicial immunity should have barred the injunctive relief awarded).

4. Defendant claims that plaintiff is only "now" sounding his constitutional claim in substantive due

process terms, and that, in any event, the due process clause has never been held to contain a substantive right to be free from an official's "stigmatizing defamation." Resp. Br. at 26-27 n.16. Defendant is wrong on both counts.

Plaintiff's pleadings, fairly read, allege a substantive due process violation since they demonstrate an unconscionable "abuse of office." *Harlow v. Fitzgerald*, 457 U.S. at 814. See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957), cited in *Richardson v. Chevrefils*, 552 A.2d 89, 94 (N.H. 1988). Moreover, in its argument on this point, the government has misconstrued the constitutional violation alleged by plaintiff. It is not just a "stigmatizing defamation," Resp. Br. at 26-27 n.16, that is at issue. Rather, plaintiff suffered a "stigma-plus" injury, that is, injury to reputation plus loss of employment status, as a direct result of a ministerial and constitutionally abusive act of a federal official.

CONCLUSION

For the foregoing reasons, and for those stated in plaintiff's brief, the judgment of the court of appeals should be reversed with instructions to the court below to remand the case to the district court for discovery and trial on the merits.

Respectfully submitted,

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